

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION  
CRIMINAL APPEAL NO. E017 OF 2025

REPUBLIC.....APPELLANT

-VERSUS-

ALICE WARUGURU MUITA.....1<sup>ST</sup> RESPONDENT  
ANTHONY NDONGA MURIU.....2<sup>ND</sup> RESPONDENT  
BEATRICE WANJIRU GIKARU.....3<sup>RD</sup> RESPONDENT  
GEOFFREY WACHIRA MAHINDA.....4<sup>TH</sup> RESPONDENT  
SHELLOMITH WANJIKU NDERITU.....5<sup>TH</sup> RESPONDENT

*(Being an appeal from ruling of Hon. P. Mutua SPM dated 4<sup>th</sup> December 2019  
in his Chief Magistrate’s Court at Nyeri Anti-Corruption case No. 2 of 2018)*

**JUDGMENT**

This is a matter which had been initiated in the High Court at Nyeri. It was subsequently transferred to this Court on 13-03-2025 for reason that the same was an anti-corruption matter and should be heard before this court. I, on my part do not see the reason that would have prevented the High Court at Nyeri from hearing and determining the appeal as it had jurisdiction to do so. Nevertheless, I will proceed to deal with it.

The appeal emanates from a ruling of the Chief Magistrate at Nyeri anti-corruption case number 2 of 2018 dated 4-12-2019 where the trial court acquitted the respondents under section 210 of the Criminal Procedure Code as according to the trial court, the prosecution had failed to establish a *prima facie*

case warranting putting the respondents on their defence. The respondents were facing the following charges;

**Count I-** *Abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003 as read with Section 48 thereof particulars being that on diverse dates between 2<sup>nd</sup> day of August 2013, and the 22<sup>nd</sup> day of February 2014, in the County of Nyeri within the Republic of Kenya, being the Chairperson, the Secretary and members of the Nyeri County Public Service Board, respectively, they used their respective offices to improperly confer a benefit on George Mwangi Muriithi, to wit, selecting the said George Mwangi Muriithi for appointment as a Sub-County Administrator in Nyeri County, an office that the said George Mwangi Muriithi was not qualified to hold.*

**Count 2-** *Conspiracy to commit an offence of corruption, contrary to Section 47A(3) of the Anti-Corruption and Economic Crimes Act, 2003, as read with Section 48 thereof. The particulars were that on diverse dates between the 2<sup>nd</sup> day of August, 2013, and the 25<sup>th</sup> day of February, 2014, in the County of Nyeri within the Republic of Kenya, the respondents conspired with each other to commit an offence of corruption, namely, abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003, by procuring the appointment of George Mwangi Muriithi as a Sub- County Administrator, an office that the said George Mwangi Muriithi was not qualified to hold.*

**Count 3-** *Abuse of office, contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003, as read with Section 48 thereof particulars being that, on diverse dates between the 2<sup>nd</sup> day of August*

2014 and 22<sup>nd</sup> February 2014, in the County of Nyeri within the Republic of Kenya, being the Chairperson, the Secretary and Members of the Nyeri County Public Service Board, respectively, they used their respective offices to improperly confer a benefit on Phares Kabugi Njogu, to wit, selecting the said Phares Kabugi Njogu for appointment as a Ward Administrator in Nyeri County, an office that the said Phares Kabugi Njogu was not qualified to hold.

**Count 4**-Conspiracy to commit an offence of corruption, contrary to Section 47A(3) of the Anti-Corruption and Economic Crimes Act, 2003, as read with Section 48 thereof particulars being that on diverse dates between the 2<sup>nd</sup> day of August, 2013 and the 25<sup>th</sup> day of February, 2014, in the County of Nyeri within the Republic of Kenya, they conspired with each other to commit an offence of corruption, namely, abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003, by procuring the appointment of Phares Kabugi Njogu as a Ward Administrator, an office that the said Phares Kabugi Njogu was not qualified to hold.

The appellant being dissatisfied with the aforesaid ruling raised the following grounds in its petition of appeal dated 16<sup>th</sup> December 2019;

1. *The Honourable trial Magistrate erred in law by failing to appreciate all the evidence presented by the prosecution and only considered the submissions by the defence, and arrived at an erroneous ruling.*

2. *The Honourable Court erred in failing to appreciate the law on Anti-Corruption and Ethics and misinterpreted Section 35 of the Anti-Corruption and Economic Crimes Act No. 3 of 2004.*
3. *The Honourable Magistrate erred in law by acquitting the accused persons under Section 210 of the Criminal Procedure Code.*
4. *The Honourable trial Magistrate erred in law by failing to appreciate that the respondents, being Chairperson, Secretary and members of the Nyeri County Public Service Board, conspired to recruit persons who did not possess qualifications for appointment to the office of Sub-County and Ward Administrators as per the advertisement thereby improperly conferring a benefit on them, which in itself is a corrupt practice and an abuse of office.*
5. *The Honourable trial Magistrate erred in law by finding that the prosecution had not proved a prima facie case against the respondents and should have placed them on their defence.*

This is a first appeal and as it is required of this court, I will re-evaluate, re-analyse and re-consider the evidence produced in the trial court as if I am conducting a re-hearing and reach my own independent conclusion. However, I will keep in my mind the fact that I did not take the evidence first hand and as such did not observe the demeanour of the witnesses and therefore give due allowance for that. This legal position has been encapsulated in many decided

cases including *Simon Taveta v Mercy Mutitu Njeru (2014) KECA 755 (KLR)* where the Court of Appeal held that;

*‘As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter.’*

Lucy Wairimu Mwangi, the first prosecution witness told the court that, in the year 2013, she was working as a personal secretary to the County Government of Nyeri (hereinafter referred to as ‘the government’) and recalled that some posts had been advertised by the County Government Public Service Board (hereinafter referred to as ‘the Board’). She and one Joyce Waceke were acting as the secretariat for the Board on request of its chairperson, the 1<sup>st</sup> respondent. The advertised posts included Chief Officers, Ward Administrators and Sub-County Administrators among others. Their role was to receive the applications as they came, then make entries in the black book showing the position applied for. They were not scrutinizing the application. After receiving the applications, they handed them over to the Board on 28/8/2013.

On cross-examination, the witness stated that their duty was only to receive the applications and they were not concerned with whether the applicants met the standards. She did not know the particulars or the requirements that the applicants were to meet. She added that the Board had just been recruited.

PW2 was one Wambui Wamucii Kimathi who worked with the Ministry of Livestock in Nairobi. She told the court that in 2013, she was the County Secretary of the government. She added that the executive decided to recruit some County Administrators and charged the Board with the role of recruitment. She added that the Board did what was expected of it by law. She was not able

to explain the process of recruitment but she believed the Board did the recruitment in accordance to the law.

She eventually got to know that people who were recruited. The information of recruitment was relayed to the executive of the government and the human resource department wrote letters of appointment which were forwarded to the County Secretary. She added that she signed the letters of appointment although she could not recall the number of officers recruited. She added that the members of the Board were the respondents with the 1<sup>st</sup> respondent chairing.

When cross-examination by Mr. Wahome then acting for the respondents, she stated that under Section 44(3) of the County Government Act, the County Secretary was the head of the public service. She stated that Section 50 of the County Governments Act provides for the qualifications of Sub-County Administrator and does not mention requirement of a bachelors or masters' degree. Section 51 deals with Ward Administrator and states that he shall have professional qualification and technical knowledge in administration and does not mention a degree.

She added that decisions of the Board are corporate and an individual member cannot make a decision. She was not able to tell what the government's Executive Committee discussed about the recruitment as she had not seen its minutes but she insisted that, it was the executive which decided that the Ward and Sub-County Administrators be hired. She admitted that there was no letter written by either of the respondents appointing George Mwangi Muriithi (hereinafter referred to as 'George') and Phares Kabugi (hereinafter referred to

as 'Phares') as a Sub-County Administrator and Ward Administrator respectively.

The witness confirmed that she was the one who had signed the letters of appointment and she could not have done so without the authority of the County Executive Committee. She also confirmed that the Committee met before the appointments and background check was to be done to ascertain the appointees' suitability.

Mercy Wangari was the 3<sup>rd</sup> prosecution witness who in 2013 was seconded to the Human Resource Department of the government where she worked for two years as an interim head of Human Resource. She added that her key duties were sorting out application forms which had been received then entering them in the computer.

The witness told the court that the Board had in August 2013 advertised for many positions including Sub-County Administrators, Ward Administrators and Chief Officers. After the applications for the jobs were received, the County Secretary gave her the assignment of sorting out the applications and keying in the information in the applications forms in the computer system. According to her, Phares had Advanced Certificate of Education and was at then working as the Chairman of Ragati River WRUA and held KRA certificate, Helb certificate and EACC certificate. For George, he was at then working at FPAK/ST/YMCA and held a bachelors degree indicated as Bachelor of Business Management and was a professional in conflict resolution. He however did not submit clearance certificates. The witness added that she was not involved in confirming whether

the candidates had met the qualifications set out by the Board and she was not aware of the requirements by the Board.

She added that she was during the interviews called in as an usher to one of the panels of the interviews but she was not involved in the shortlisting. She was later involved in opening the files for the candidates who had been put in the payroll.

In cross-examination, she could not recall the date on which she fed the information into the computer. She added that she was not aware of the requirements or qualifications for each position but she stated that the Sub-County Administrator was to be qualified in administration and management and there is no requirement of a degree. She was shown some professional and academic certificates which were not in the information she fed in the computer.

PW4 was one Doris Njambi Mwangi who joined the Board in 2013 after being recruited as a member of the Board together with the respondents and sworn in on 21-10-2013. On 29-11-2013, there was another advertisement for Ward Administrators. She added that there were two advertisements and that she joined the Board after the first one.

The witness appears to me to have been selective in what she could recall and at this juncture, the prosecuting counsel applied for adjournment stating that he could not proceed because the witness was giving evidence which was not agreeing to what was in her statement. Despite objection from the respondent's counsel, the court allowed the application to stand down the witness.

When she resumed, PW4 stated that the Board held sittings where the issue of recruitment of Sub-County and Ward Administrators was deliberated. After identifying some minutes, she stated that she was not aware of the meeting of 4/11/2013 but she attended one of 27/11/2013. According to her, she looked at some minutes and got to know of the meeting of 4/11/2013. She stated that when she looked through the meetings' minutes, she saw that shortlisting had been done on 4-11-2013 when she was absent. Relevant to this case, there were 30 positions for Ward Administrators and 6 for Sub-County Administrators. After she saw the minutes of the 4/11/2013, she did not inquire about the proceedings or how the process was done or what transpired.

The witness added that the Board set the dates for interviews for the Sub-County Administrators from around 28<sup>th</sup> to 29<sup>th</sup> January 2014 and for the Ward Administrators for 6<sup>th</sup> and 7<sup>th</sup> February 2014 which interviews were done. She confirmed that she participated in the process of the recruitment and took part in interviewing some candidates. She went on to tell the court how the interviews were conducted including post-interview meetings and discussions on the candidates' performances. According to her, these deliberations were not minuted. She alleged that she could not recall them doing the final selection but she maintained that the recruitments were done based on the interviews the Board had done.

The witness added that the advertisement for the Ward Administrators had been done twice and the requirements for the two were not the same. The advertisement of August 2013 called for 5 years' experience with anyone with a diploma while in the one of November called for 3 years. In the November one,

it was indicated that for any other qualification a candidate should show 10 years with demonstrated leadership skills. This was not in the original advertisement.

The witness did not know who prepared the advertisements and she could not tell whether they were done by the respondents. She also said that Section 50 and 51(2) of the County Governments Act lists the qualifications of a Sub-County and Ward Administrators and it does not require a diploma, degree or any other post graduate qualification. Section 51 (2) gives qualifications for a Ward Admin.

She added that the 2<sup>nd</sup> respondent was the Board Secretary and did not have a vote in the decision making. She also could not tell if Phares and George were appointed either by the 5 respondents jointly or separately. She stated that she did not know why she was not one of the accused persons yet she participated in the interviews, asked questions and scored the candidates. She also did not know of any wrong doing in the appointments.

She admitted that she was bound by the principal of collective responsibility and added that by the time she left the Board, she had not written any complaint letter about the appointments of any Sub-County or Ward Administrator. She admitted that the appointments were made properly and according to the law and procedure and maintained that she stood by the way the appointments were made. She was referred to some certificates in several qualifications of George and Phares and stated that the Board was satisfied with them.

PW5 was one John Gicheru Macharia. He testified that between 2001 and 2006, he was working at the Presbyterian College in Thogoto but at the time he

testified, the college was no longer in existence. In 2008, it was granted an interim authority and it became a university headed by a vice-chancellor. He recalled that on 6-05-2016, the then director of the college one Patrick Irungu called and told him that Ethics and Anti-Corruption Commission (hereinafter referred to as 'the EACC') officers wanted to talk to him about a certificate that was bearing his signature at a time that he was not serving there. He went to the EACC offices and was shown a certificate which had a signature that looked like his.

He was shown a certificate in the name of Jackson Kibuntu Thagana and denied the signature that was on it and added that the college was in 2010 upgraded to Presbyterian University College and the documents from there should therefore bear the title Presbyterian University of Kenya. He added that as far as he was concerned, the certificate was not genuine.

When he was cross-examined, he admitted that when at the college, he used to sign certificates as a principal. He added that he could not recall all the certificates that he signed neither did he know when the college stopped issuing the previous certificates.

He was followed by Joyce Waceke Gitahi, an employee of the government who stated that in 2013, he was the secretary to the Governor. She stated that in August 2013, some posts she could not remember were advertised by the government and added that the 1<sup>st</sup> respondent asked her and a colleague to open a register indicating the name of the applicant, date received and the post applied. They would receive the application and stamp it at the top with the date received. She confirmed receiving various applications although some were not

stamped and later handing them to the 2<sup>nd</sup> respondent. Very little in cross-examination is relevant to this appeal save that she did not know who or how the applications received after the advertisement of 29/11/2013 were handled.

PW7 was Phares Kabugi Njogu who told the court that he was working as a Ward Administrator in the government and at the time stationed at Mukurweini having been appointed in March 2014. The position was advertised sometime in the month of August 2013 and November 2013 then in January 2014 he was called for an interview. He added that the qualifications needed for a Ward Administrator in the first advertisement were; a Kenyan citizen, 1<sup>st</sup> degree from a recognized university with 2 years' experience in administration and management, diploma with 5 years' experience, and satisfaction of Chapter 6 of the Constitution. In the second advertisement, the requirements for Ward Administrator were; a Kenyan citizen, 1<sup>st</sup> degree with work experience of 2 years in administration and management, diploma with 3 years' experience in administration and management and any other experience in community development.

He added that his highest academic qualification was O-levels and A-levels and that he had also done a 2-year programme with computer consultants in computer programming and systems analyst. He went on to narrate some in-job trainings he attended in different companies and government institutions. He stated further that he was later on alerted that he was successful after going through interviews.

In cross-examination, he was shown some documents and confirmed having some academic and professional certificates. He also made reference to Section

51(2) of the County Governments Act which sets out qualifications for a Ward Administrator. He added that he had a lot of professional qualifications and technical knowledge in administration and experience. He stated further that the advertisement for 2/8/2013 was not in tandem with the Act as it talked of a degree whereas the Act did not require a degree. He alleged that he was actually over qualified for the job. According to him, in fact, the government was giving him special assignments. He added that the 2<sup>nd</sup> respondent was not in office on 2/8/2013 and could therefore not have put up the advertisement. He added that he learnt of his shortlisting from newspapers.

He added that he had been cleared by the EACC itself and he was not aware of any letter that it wrote to say that he was not suitable. He was cleared by a CRB, HELB, and the DCI. He concluded that anyone saying that the respondents appointed him wrongly or illegally was totally wrong.

Fred Nyambane Owanda working with the Technical and Vocational Education Authority hereinafter referred to as 'TVEA') testified as the 8<sup>th</sup> witness. He told the court that the Authority organizes and regulates training institutions by registering them. He said that Vision College of Business and Accounts was not in their records as a registered institution. Mountain Top Institution was registered as Mountain Top Hotel and Travel Institute. In cross-examination, he stated that they do not regulate courses administered by the professional institutions like IPA or IPSC. He also admitted that Kenya Institute of Management offered recognized professional course and they do not regulate it or universities.

PW9 was Stephen Yego a forensic document examiner working with EACC stationed in Nairobi. The summary of his evidence was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents signed several minutes of the Board and appointment letters in question.

George Mwangi a Sub-County Administrator with the government was the tenth witness. He testified that he saw advertisements in the media, applied and was recruited as he was qualified although the advertisements had put qualifications which were not in the law. Interestingly, the witness told the court that the qualifications shown against his name in the list of applicants were not correct. For instance, he did not possess a bachelors degree but the list showed that he had. He also pointed out that the list had many errors. Like PW4, this witness seemed to be hostile as the state counsel is seen stopping and warning him twice about giving evidence he had no facts about especially when he seemed to testify against the prosecution case.

He added that before he joined the government, he was working with an organization called Portions Link where he was the managing partner in charge of research and training. He was cross-examined by Mr. Wahome and said that the only requirement for a Sub-County Administrator is that, one should have qualification and knowledge in management. He added that at the time of the advertisement, the Board was not in existence. He also emphasized that his performance since employment was satisfactory and he had been promoted for good work. He admitted that one Priscilla was one of those who interviewed him and she scored him very highly yet she was not one of the accused persons. He also stated that he did not know any of the accused persons before the recruitment.

PW11 was Priscilla Muthoni Wanjiri working with the ministry of Education at Jogoo House as an assistant secretary. She told the court that she was previously working in the government as the Executive Committee Member in charge of public administration. She recalled that she was invited in the recruitment of candidates of Sub-County Administrator. The decision to recruit was made by the County Executive Committee at which time the Board was not fully functional as it had only the Chairperson and a Secretary.

She added that her role was to give technical advice on administrative issues. Before the interview, they ascertained if the applicants had qualified for shortlisting. She added that those shortlisted had qualified. She stated further that she went through the list to confirm that the applicants had the minimum qualifications. After the interviews, the panelist added up the scores then they handed over the score sheets to the Secretary of the Board, the 2<sup>nd</sup> respondent. She was later given a list of successful candidates to issue letters of appointment. She was also required to do quick background check which she did not. According to her, the background check should have been done before the shortlisting. She added that it was the County Secretary who issued the letters to the successful candidates and that the Executive Committee had faith in what the Board did.

When she was placed under cross-examination, she told the court that the advertisements were not put up by the respondents. She admitted that the requirements set out in the advertisements of 2/8/2013 and 29/11/2013 were not in line with Section 50 and 51 of the County Governments Act and therefore they contravened the law. She stated that the Board followed the statutory

provisions and did not breach them. She admitted that she scored George at 80 per cent. She also confirmed that Phares was qualified for the job of Ward Administrator and her recommendations in her score sheets were that the two were qualified for the positions they had applied. She added that she was the supervisor of both George and Phares and could vouch for them. They were amongst the best performers.

Testifying as the 12<sup>th</sup> witness, Elijah Wambugu Ndegwa who worked in the Presbyterian Church of East Africa, in the department known as Theology Education Extension told the court that his responsibilities included office administration, recruiting and assisting students taking courses, administering and marking exams, compiling data and preparing for graduation. He joined Mt. Kenya region in December 2012 and was confirmed in 2013.

In regard to this case, the witness said that she was called by a Mr. Salat from EACC who wanted to confirm the authenticity of a certificate issued to one Jackson Thagana. I don't find the testimony of this witness relevant to this appeal as it does not relate to the counts in issue.

PW 13 was George Kariuki an advocate of the High Court of Kenya. He told the court that he was appointed as a member of the Board around July 2013 but he resigned shortly after 2 or 3 weeks before he could be sworn in and before the Board could have its first sitting. He stated that he participated in drafting an advertisement for some positions including the Ward and Sub-County Administrators in issue in this matter.

He added that the Transition Authority and Public Service Commission gave them general specifications for each of the posts. In regard to the Sub-County Administrators, the request was that the candidates must be a Kenyan with at least a degree from a recognized university in Kenya and a post-graduate qualification, work experience of not less than 5 years and meeting Chapter 6 of the Constitution. Sub-County Administrator was to be equated to a job group of profession management level.

He added that the Ward Administrator's post was equated to a middle level management staff and was required to have a bachelors degree in the field and 10 years' experience. He added that they also looked at the County Government Act to see if the positions were established by the law. They were also guided by Public Service Commission Career Progression Guidelines (hereinafter referred to as 'the guidelines'). He added that he resigned before the advertisement was published and that the contents of the advertisements were in line with their discussions with the Transition Authority.

In cross-examination, the witness stated that, he did not draft the advertisement and insisted that there was no Board as per the law. He admitted that the guidelines in court were dated July 2014 while the activities they were doing were in July 2013 and admitted that he could not have used the guidelines before the court and that the guidelines did not speak of Ward and Sub-County Administrators. He added that Sections 50 and 51 of the County Governments Act does not require degrees for the said positions. He also stated that he did not know of any offence the respondents had committed.

PW 14 was James Wambua a Deputy Commissioner in Tharaka Nithi County who in 2015 was an Assistant County Commissioner in Tetu in Nyeri County. He testified that in 2014, he was co-opted in an interview panel for interviews conducted on 6/2/2014 whose secretary was the 2<sup>nd</sup> respondent. He was involved in the interviews of Ward Administrators as a technical member based on his experience as an administrator.

He stated that at the end of each candidate's interview, they would give back the score sheet to one member of the panel. He added that, the basic qualification that the candidates needed to have was a diploma. The witness added that after handing over his score sheets, he did not participate further in the recruitment including the aggregation of the scores of all the candidates. He did not get to know who succeeded from amongst the people he interviewed.

In cross-examination, the witness stated that, he participated in the interviews to provide technical support. He added that one of the candidates he interviewed and scored was Phares whom he gave a score of 80 per cent.

Eliud Muriithi the 15<sup>th</sup> witness joined the Board in July 2013 and left in July 2018. He stated that, the operations of the Board started in October 2013 when all the members were recruited and sworn in before which time, advertisement for the jobs in issue had been placed by the then Transition Authority in liason with the government's executive. He stated further that the Board was not consulted about the advertisements as they just saw them in the press. According to him, they saw the requirements for the jobs but there was nothing they could do.

The witness added that during the briefing about the positions, the Chairperson of the Board informed the Board that, since these advertisements had been done through another body, the Board should adopt those advertisements and their responses as their own. The Board therefore owned the advertisements and the whole process without variations. He was present in all the meeting but he was not sure of the meeting of 4-11-2013 stating that the meeting he remembered attending dealt with Executive Committee Members.

The witness stressed that he did not participate in the shortlisting for the positions of the Ward and Sub-County Administrators which was done during the month of November 2013 on a date that he was not present. After being shown the minutes for 4-11-2013, he changed the story and stated that he was present at the meeting that day but insisted that the minutes showing that the Ward Administrators and Sub-County Administrators were short listed on that day are not correct.

He insisted that it was the Board which did the shortlisting and that it adopted the guidelines and the parameters set out in the advertisements which it relied on in selecting those to be interviewed. He added that he also participated in the interviews and that at the interview, the Secretary to the Board was to prepare a list showing the number of people shortlisted and their qualifications. He observed that the list had George shown as having Bachelor of Business Management and experience in conflict resolution. The list also had Phares who was shown to possess Kenya Advanced Certificate of Education. He alleged that it was the Secretary who was to confirm that all the persons in the list were qualified.

The witness stated further that his role in the interview was that he was chairing one panel and that he ensured that the interview was conducted as per the tool they had prepared. The Chairperson of the Board chaired the other panel. He added that George whom he participated in interviewing met the qualifications. He rated him in various aspects

The witness claimed that he was not charged alongside the respondents because he came to realise that the Board's minutes were not representing the actual positions and he raised the concerns in writing. He gave an example as that, since they started from November 2013 up to March 2014, all the minutes were not signed. He added that if he had known that George and Phares had not met the qualifications as set out in the advertisement, he would not as the chairman of the panel have allowed them to take part in the interviews. He alleged to have raised the issues he had through emails which he identified in court and went on to explain the problems he had with minutes of various meetings. The witness insisted that he was not shown degree certificate for George or diploma certificate for Phares and concluded that the two were not qualified as per the advertisements.

In cross-examination by Mr. Wahome, the witness denied that he had gone through the draft of the advertisement and approved it as alleged by PW13. He admitted like many who came before him that Sections 50 and 51 of the County Governments Act do not mention masters, doctorate, bachelors degree, diploma, certificate or post-graduate certificate and therefore the advertisements were not in tandem with the said sections. He added that technically, there was nothing wrong with the Chairman and the Secretary signing the minutes of 30/11/2013. The witness confirmed that he interviewed

many people including George and scored him highly and actually he was the one to ask questions on academic qualifications.

When he was shown George's application and read thorough it, he stated that he had not mentioned anywhere that he holds a degree in management. He confirmed that, since George was employed, he had never gotten any complaint about his work and the Board never sat on any disciplinary issue about him. He stated further that based on all his documents and experience, George met the criteria. He also identified some academic and experience documents in respect of Phares and added that looking at his documents and experience, he . qualified for the post of a Ward Administrator. He also confirmed that he participated in interviews for Ward Administrators. He denied that he was raising issues of the minutes because he wanted to be the Chairman or fuel fight in the Board.

The witness confirmed that the issue of Ward Administrators was raised in the County Assembly of Nyeri and a response properly given that Section 51 of the County Governments Act set out the requirements as qualification in management and technical knowledge and that the Board used this to craft the advertisement to ensure that diverse candidates with various backgrounds were brought on board. He added that the full Board was thereafter involved in the interviewing and final selection and that all the members of the Board including himself signed the report to the Assembly which he still stood by and own because he signed it.

The witness stated further that the executive arm of the government was supposed to conduct background checks. After being shown a letter of

resignation by Mrs. Muita, the Chairperson that also accused him of disrespecting the Board and absenteeism, he admitted that; he was absent and late during numerous Board meetings, Mrs. Muita and the other respondents did not employ anyone on their own and that it was a collective responsibility of the Board and the letters of appointment came from the executive. He added that even with the recommendation of the Board, the candidates could not have been employed without the letters from the Executive. He admitted that after Mrs. Mwita left, he became the acting Chairman but denied that the letters he was writing were to actuate his dream to be the Chairman.

The prosecution's last witness was Salad Boru an investigator with EACC who was the lead investigating officer in this case. He told the court that the EACC received some allegations of illegal recruitment, selection and employment of staff by the Board. The details were that some of the candidates who had succeeded had no proper qualifications and some presented fake documents and that some Board members conspired to enlist some candidates.

After the case was allocated to him, he wrote a request for documents to the Secretary of the Board. He received documents, some originals others certified copies. He narrated that the Board was sworn in on 29/10/2013 and had its first meeting on 30/10/2013. The full board members were, Alice Muita Eliud Murithi, Doris Njambi, Geoffrey Mahinda, Beatrice Gikaru, Shellomith Nderitu and the Secretary, Antony Ndonga. By this time, the 1<sup>st</sup> Secretary had resigned. The witness added that in the first meeting, the 1<sup>st</sup> respondent mentioned to the Board that there were jobs which had come up and had been advertised and they needed to prepare a shortlist.

The witness added that relevant to this case, there was one advert dated 2/8/2013 for 6 positions of Sub-County Administrators and 30 Ward Administrators. The Sub-County Administrators were to join at job group P where the applicants were required to be holders of at least a bachelor's degree from a recognized University in Kenya and at least 5 years' experience in middle level management. As regards the Ward Administrators, the candidates were to join at job group N and the requirements were a bachelors degree from a recognized university with 2 years' experience or a diploma with 5 years' experience.

The witness added that from his investigations, the Board was initially not fully constituted as there were only 3 members; the Chairperson Alice Muita, Murithi and Nyamitha, the Secretary. The Board was constituted on 29/10/2013 comprised of Alice Muita, Eliud Murithi, Doris Njambi, Geoffrey Mahinda, Beatrice Gikaru, Shellomith Nderitu and the Secretary, Antony Ndonga. By this time, the 1<sup>st</sup> secretary had resigned.

The witness testified that George who was one of the successful candidates for the Sub-County Administrators positions is not recorded in the register where the applications that were received were recorded. He produced the register as an exhibit. The Board nevertheless supplied him with his application documents which he also produced. George's application was also not stamped as received like the others. He added that George's highest qualification at the time of application was a diploma transcript part II from Kenya Institute Management. He had not been awarded the diploma yet the position called for a person with a bachelors degree. He alleged that there

was no Curriculum Vitae for him but there was an application letter. He added that George had not attached any certificates like self-declaration from EACC, KRA or HELB clearance.

The witness added that the advertisement for the Ward Administrators stated that one needed to have a diploma and 2 years' experience and that Phares had East African Certificate of Education issued in 1979 in Nkubu High School. His application was formally acknowledged in the register and it had a date stamp showing that it was received. He had clearances from the KRA, HELB and DCI. He alleged that Phares' EACC certificate had some errors as he had submitted it as a candidate for the elections meaning that the application was not for this particular position.

He added that Phares' Curriculum Vitae showed that he had a diploma in Business Administration from Vision College of Business Studies Serial No.85517. He alleged that it was only a negligent mind that could not see the errors in the documents and added that they wrote to 'TVEA' and got a response dated 7/4/2016 to the effect that they had no such college in their records. The name of the college did also not appear in the records of registrar of companies.

He added that the applications for Sub-County Administrators were 115 while the register had 112. He stated further that the minute shows that 112 members had applied. This is however cancelled to read 115. The 2 was cancelled and 5 inserted and according to the witness, this is where the addition of people who had not applied began.

For the Ward Administrators, the minute shows that there were 380 applicants and 84 were shortlisted. Then there was an entry that the Board needed to re-advertise. The minutes did not state when the shortlisting was done and there were no particulars or names of those shortlisted. He added that Phares was listed showing his academic certificate as KCSE. The shortlisting was in the minutes of 4/ 11/2013. In the meeting of 27/11/2013, all the Board members were present except Eliud Murithi and the minutes show that final shortlisted candidates and interview design agreed. The witness stated further that, the interview for Sub-County Administrators were fixed for 27<sup>th</sup> and 28<sup>th</sup> January 2014 while those for Ward Administrators were slated for 6<sup>th</sup> , 7<sup>th</sup> , 10<sup>th</sup> and 11<sup>th</sup> February 2014.

According to the witness, it was clear that there was sufficient pool for candidates to be interviewed and there was no need to re-advertise. He added that surprisingly on 29/11/2013, an advertisement appeared showing that on 27/11/2013, the Board had agreed on the list of those to be interviewed and schedule was prepared. It shows that 84 candidates were to be interviewed. He added that in the advertisement of 29/11/2013, the positions for Sub-County Administrators were not advertised. It was only the positions for Ward Administrators that had some changes.

The witness testified further that the EACC also got the minutes of the board held on 15<sup>th</sup> and 19<sup>th</sup> January 2014 which show those present as George Mahinda, Anthony Ndaya, Beatrice Gikaru and Shellomith. He went on to point out errors in those minutes including the date of the 1<sup>st</sup> advertisement. The witness then identified the minutes of 28/1/2014 which showed that Eliud Murithi was absent and stated that the earlier minutes showed that the 28<sup>th</sup> and

27<sup>th</sup> January 2014 were scheduled as interview dates and that there was evidence that interviews were conducted on that date. He pointed out that minutes for 27/11/2013 and 28/1/2014 were word for word identical, the only difference being the date. The minutes showed that the interviews were scheduled for 27/1/2014 and 28/1/2014 the previous day and wondered how that could be possible.

He continued by stating that there is evidence that Eliud Murithi was present and he interviewed George. He also identified minutes for meeting held on 29/1/2014 where all members were present. They read that the Board carried out interviews on 27<sup>th</sup> and 28<sup>th</sup> January 2014. 18 out of 20 candidates were interviewed based on various criteria and they selected 8 candidates instead of 6 advertised posts. He added that these 8 people satisfied the requirement of gender, regional representation and all.

He added that final selection of Ward Administrators was in the minutes of 12/2/2014. The Secretary was to communicate to the executive about the selection which was done on 25/2/2014 showing appointment of Ward Administrators. The communication listed Phares as one of those selected. Communication of appointment of 8 Sub-County Administrators was done through letter dated 29/2/2014. The witness went on to point out what he perceived to be inconsistencies in the minutes right from the first Board's meeting to the end of recruitment including lack of signatures, attendances, confirmation, holding of meetings on weekends and the agenda.

PW16 added that the 2<sup>nd</sup> respondent wrote a letter confirming that Nyeri County did not have career guidelines and they were relying on advice from Transition

Authority, Salaries and Remuneration Commission and Public Service Commission. Without guidelines from the County, they picked the Sub-County Administrator at job group P and Ward Administrator at job group N. The witness checked the entry positions for the Sub-County and Ward Administrators and the guidelines showed that for the 2 positions, one required a bachelor's degree and post graduate qualifications. He added that two Board members were not charged because, they were not present either with or without leave

On being cross-examined by Mr. Wahome, the witness stated that as at 2/8/2013, there was no fully functional Board and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were not members of the Board. He added that PW4 and PW 15 were members of the board and were listed in some minutes as present when they were actually absent. He admitted that the advertisement of 2/8/2013 was not put up by either of the respondents.

He admitted that Section 50 of the County Government Act did not expressly talk of a degree and added that if Parliament wanted to put in a degree as a requirement, nothing would have stopped it. For Ward Administrators, Section 51(2) does not mention diploma as a qualification. He insisted that some minutes showing that Eliud Muriithi was present in some meetings were disputed. He also stated that he was not aware that Doris was present during the shortlisting. He however admitted that Mr. Murithi conducted the interviews for both the Ward and Sub-County Administrators and he in particular interviewed George Murithi and awarded marks. Doris also conducted some of the interviews for the Ward and Sub-County Administrators.

Although the minutes showed that Mr. Murithi and Doris were present during meetings and interviews, the witness insisted that they did not participate in selection of Phares and George. He also was not aware that the entire Board including Doris and Murithi signed a statement addressed to the County Assembly on the issue of the appointments.

He stated further that he was not aware that Mr. Murithi was micromanaging the Board with intention of becoming the Chair. He added that the guidelines for July 2014 did not have any title for Ward and Sub-County Administrators. He admitted that an Act of Parliament is superior to guidelines and that the Board was obligated to follow the law. He also stated that he had no evidence to prove that the respondents met outside the office and decided to give the people in question work.

***Analysis and determination.***

This appeal was disposed of by way of written submissions. I have read the submissions of the appellant dated 25<sup>th</sup> September 2025, those of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents dated 10<sup>th</sup> October 2025 and those of the 4<sup>th</sup> respondent dated 25<sup>th</sup> November 2025. I have also gone through the proceedings and evidence produced in the lower court, the petition of appeal and the ruling of the trial court being appealed.

There is no dispute that the 1<sup>st</sup> appellant was the Chairperson of the Board, 2<sup>nd</sup> respondent the Secretary to the Board and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents its members. It is also common ground that Phares and George made applications for the jobs in issue and were recruited through interviews conducted by the Board.

The question which arises in this appeal is whether there was conspiracy to commit an offence of abuse of office as claimed by the appellant and whether by recruiting George and Phares, the respondents abused their offices.

For an offence of conspiracy to commit an offence to succeed, the prosecution must show that there existed an agreement between two or more persons to commit an offence, which agreement must have ingredient of an intent to achieve the objective for an unlawful purpose and an action towards achieving that objective. As rightly observed by the trial court, the ingredients of conspiracy therefore are; An agreement by two or more persons to commit an unlawful act, an intention to commit the unlawful act and an action or conduct in furtherance of the agreement.

The agreement may be demonstrated by direct evidence or deduced from the circumstances of the case or some criminal conduct of the persons. The criminal conduct in this matter is abuse of office by employing people who were not qualified. From the evidence produced, I see nothing that indicates that the respondents had a meeting or agreed to have the persons in question employed. The results of the interviews were collated from scorecards of different members of the panels including PW5 and PW13. There were also people from outside the Board who were co-opted in the interview and there was no evidence showing that the respondents herein went against the results collected in the interview rooms. In that regard, there is no proof of conspiracy.

Turning to the charges of abuse of office, it is my observation that, the most contentious issue herein is whether George and Phares were qualified for their

respective jobs and whether the respondents picked them with intention of conferring benefits to them. It is of note that the respondents were not responsible for the first advertisement which gave the qualification required for the jobs. It has been alleged that the Board adopted the advertisement and the requirements given therein. The question one has to answer is, whether the Board even if it adopted the advertisement, had mandate to prescribe qualification different from those provided by the law.

My answer to the above question is that, yes, the Board had the powers to do so. What the law provides in my view is minimum qualifications. However, in the same vein, where discretion exists, the same can be exercised in dimension different from what was originally intended as long as it does not break the law. In that regard, the Board had freedom to select applicants whose qualifications may have had differed with the advertisement as long as the same did not go below the statutory minimum.

It is common ground that the two candidates whose selection is the basis of this matter were qualified to hold their respective positions. This is pursuant to Sections 50 and 51 of the County Governments Act. PW4 and PW15 who in my view were the core and the cog of driving the narrative that George and Phares were not qualified admittedly told the court that they participated in the interviews and rated the two candidates highly. They were also in agreement that the two were qualified for the job. In their own words, they did not understand why the respondents had been charged leaving them out.

The point of departure is that the candidates did not meet the qualification in the advertisements made by the government. The appellant took position that the

two should have had a bachelors degree and diploma certificates. These are not provided in the County Governments Act and in my view, the fact that the advertisement contained such requirements did not amend the law or make the two applicants less qualified. A person can only be charged with a criminal offence for failure to adhere to the law and not a decision of another public officer or body unless there is a corresponding requirement of the law that binds that person to comply with that other officer's or body's directives. Doing so would be tantamount to charging and prosecuting a person for an offence which is not provided for in any written law hence unconstitutional.

Adopting the advertisement if it happened, did not amount to changing the provisions of the law. The same was a deliberation and resolution of the Board which if not adhered to may lead to remedy elsewhere but not a criminal prosecution. If it must find its way to criminal proceedings, the appellant should have sought refuge in other regime of the law and not lack of qualifications of the candidates.

The qualifications for the position in question are defined in Sections 50 and 51 of the County Governments Act. The qualifications under the aforesaid Sections of the law do not include a bachelors degree or diploma certificates. I do agree with the submissions of the respondents that where a statute has not provided for specific qualifications, one cannot be found to have committed an offence by failing to call for a higher qualification.

I gather from the proceedings that the prosecution leveraged its case on allegations by PW4 and PW15 who sought to distance themselves from the shortlisting of the candidates and the re-advertisement of the positions of Ward

Administrators where academic qualifications and lowering of experience. The appellant also put forth argument on the failure to sign minutes and that some of the minutes did not reflect true deliberations of the meetings and some were held on Sundays and Saturdays.

Much of the testimony about deliberations of the Board and errors in the minutes came from PW15. In my assessment, this witness came out as a bitter person who was at war with the rest of the Board members. This is exemplified by his efforts to distance himself from the resolutions of the Board and his perennial absence. It must be understood that a member of a Board of a body corporate is bound by the principle of collective responsibility and becomes part of the decisions even where he is absent unless there is established a clear criminal, negligent or unlawful conduct of members present which becomes personal to each member.

The same may be said of PW4. The two witnesses may not have been in the highlighted meetings but that does not make the decisions from the said meetings illegal simply because they did not like or agree with them. The said witnesses participated in interviewing George and Phares and scored them highly. Actually, PW15 told the court that he chaired the panel that interviewed Phares. His efforts to turn against the same act must be seen with careful lenses. Either he was out to fix his fellow Board members or he was cajoled to testify against the respondents. This court has not lost sight of the difficulties PW4 displayed in her testimony prompting the court to ask the prosecution whether it wanted to have her declared as a hostile witness.

The argument by the appellant that the two persons were not qualified as per the guidelines does not in my view hold water. It was not sufficiently demonstrated that the guidelines were applicable in this case and even if there was such demonstration, it is notable that they were done in 2014 while the recruitment exercise was done between August 2013 and February 2014. They were therefore not in force in 2013 when the process started and even in February when the same was concluded. Therefore, as rightly stated by the trial court, the respondents could not be accused of failing to comply with non-existent guidelines.

Even if PW4 and PW 15 were not present in the meetings red-flagged by the prosecution, it is evident that they, as members of the Board signed the report submitted to the County Assembly which gave the recruitment a clean bill of health. In his testimony PW15 stated that he still stood by that report. The only reason they were not charged alongside the respondents herein is in my view that the appellant chose to pursue selective prosecution which can only be interpreted to mean that there was witch-hunt and a motive other than advancement of public interest.

In the circumstances, I agree with the trial court that calling upon the respondents to defend themselves would have been an exercise in futility. The respondents had no duty to close the gaps left in the prosecution's case. An accused person has no duty of proving his innocence and he will be entitled to an acquittal where he succeeds in creating a reasonable doubt in the prosecution's case. In ***Maina & 4 others v Republic (2021) KECA 126 (KLR)***, the Court of Appeal held as follows on this position;

*‘It must be recalled that in order to justify a ruling that an accused person has a case to answer, the prosecution evidence must be such as would entitle a reasonable tribunal, properly directing itself on it, without more, to convict. If the evidence is either devoid of relevant elements that would go to establish the offence charged, or has been so discredited in cross-examination as to be of low credibility or probative value, the court has a duty to uphold a submission of no case to answer, and acquit the accused. It has to be so, for to hold otherwise would be to say that a case that is incapable of reasonably sustaining a conviction should still be answered by the defence. What would be the use of such answer unless the intention be that the accused would thereby somehow provide, contrary to the principle of non-self-incrimination, facts that would pad and patch up the holes and defects of the prosecution case to the point where the court might then be entitled to convict?’*

*Such an approach would be wholly untenable and inimical to the golden thread that postulates that the burden of proving a criminal charge beyond reasonable doubt resides with the prosecution throughout the trial and never shifts. This principle is so fundamental that it must be jealously guarded as it implicates the liberty of all citizens as well as their human dignity.’*



In conclusion, I find that the Honourable Magistrate was right in acquitting the respondents under Section 210 of the Criminal Procedure Code. I see no reason to disturb that sound decision and this appeal is therefore found lacking merits and the same is dismissed.

Dated signed and delivered at Nairobi this **18<sup>th</sup>** day of **December** 2025.

**B.M. MUSYOKI**  
**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of;

Miss Wangia for the appellant;

Mr Wahome Gikonyo for the 1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> and 5<sup>th</sup> respondents;

Mr Mwangi holding brief for Mr. Muturi for the 4<sup>th</sup> respondent; and

All the respondents.

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